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Ethics Inside the Law Firm: Do It My Way or You're Fired

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BOOK REVIEW

ETHICS INSIDE THE LAW FIRM

DO IT MY WAY OR YOU'RE FIRED. By David W. Ewing. New York, N.Y.: John Wiley & Sons, Inc., 1983. Pp. xii, 387. $17.95.

*Reviewed by L. Harold Levinson**

The legal profession should clarify the mutual duties of law firms and their associates. David Ewing's book, *DO IT MY WAY OR YOU'RE FIRED*,[1] provides useful commentary on recent trends in the management of business enterprises, although without specific reference to the management of law firms. Lawyers may use Ewing's philosophy to supplement the proposed American Bar Association's Model Rules of Professional Conduct (Model Rules),[2] which deal to a limited extent with the duties of supervisors and subordinates in the law firm. This Book Review, however, proposes a broader formulation of the duties of law firms and associates, one that is consistent with but that goes beyond the approaches of Ewing and the Model Rules. The theory of this Book Review is that the law firm and its associates must recognize that they owe each other a fiduciary duty which is an essential component of their professional fiduciary duty to society.[3]

Part I of this Book Review examines the two business management models — the autocratic and the "good" — that Ewing discusses in his book and concludes that the "good" management model serves well as the basis for the law firm management theory

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1. D. EWING, DO IT MY WAY OR YOU'RE FIRED (1983).

2. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft Feb. 1983). This Book Review was written after the February 1983 meeting of the American Bar Association (ABA) and before the August 1983 meeting. The version of the proposed Model Rules that the Book Review discusses is the proposal as amended at the February 1983 meeting. *See generally* 69 A.B.A. J. 421 (1983) (discussing debate of ABA House of Delegates regarding amendments to proposed Model Rules).

3. This Book Review explores only the relationship between partner and associate in the law firm. To the extent that lawyers who are not members of a law firm share many of the same duties and privileges, the analysis of the Book Review is applicable to them.

that this Book Review proposes. Part II outlines the provisions of the Model Rules that are relevant to law firm management. Part III introduces this reviewer's theory of the fiduciary duties of law firm partners and their associates. Part IV gives a hypothetical example of two law firm associates who face a series of dilemmas when a law firm partner instructs them regarding the representation of a corporate client. Part IV offers solutions, first under the Model Rules alone, then under a combination of the Model Rules and the fiduciary theory. This juxtaposition demonstrates the more comprehensive guidance that the fiduciary theory can provide. Part V concludes that the fiduciary theory complements the Model Rules and Ewing's "good" management model and creates a management theory that is desirable for law firms.

I. THE EWING MANAGEMENT MODELS

Ewing, in *DO IT MY WAY OR YOU'RE FIRED*, portrays two management models for business enterprises—the autocratic and the "good."[4] Businesses in the autocratic model can discharge an employee or subject him to other forms of "perfidious punishment" for a good reason, a bad reason, or no reason at all.[5] Employees consequently are in danger of discharge or punishment for activities such as expressing dissent within the organization, blowing the whistle on the organization to outsiders, refusing to carry out illegal orders, or refusing to submit to indignities such as sexual harassment. Ewing writes that this state of affairs leads to low morale, loss of self-respect, and tension among the employees and thus deprives management of the creativity and enthusiasm that the employees otherwise could provide. The lack of cooperation between management and employees in an autocratic organization also can harm the organization. For example, management may ignore an employee's warning that a crucial safety test taken during the design stage was falsified, may discipline the employee for even raising the issue, and may market a dangerous product. By mar-

4. Ewing uses the term "the 'good' organization" throughout his book to describe his preferred model. See D. EWING, *supra* note 1, at 21-23 for the attributes of this model.

5. Ewing provides "A fiend's manual of perfidious punishment," by describing various techniques—short of outright discharge from employment—that managers can use to express their displeasure with undesirable employees. These techniques range from moving the employee's desk to the immediate proximity of a notorious cigar smoker to promoting the employee to a useless job. *Id.* at 135-42. The most celebrated type of perfidious punishment in the law firm context occurs when a firm excludes an associate from the group that it invites to become partners.

keting this dangerous product the organization may suffer serious consequences that management could have prevented if it had listened to the employee.

Ewing labels his contrasting model the "good" organization. Management in the "good" organization is open and receptive to employee comments, suggestions, and criticisms of managerial decisions and policies. This receptivity brings tension and conflict into the open within the organization, encourages employee participation in decisionmaking, and assures fair procedures for the proper handling of employee dissidence. The organization may discharge inefficient employees or employees who constantly complain without good reason, but "good" management respects the views of employees who assert reasonably arguable complaints. Employees in a "good" organization, as a consequence, face discharge or punishment only for good cause and after fair procedures. The organization benefits from high morale, creativity, and enthusiasm. Employees and management cooperate in protecting the organization against the marketing of a dangerous product. The organization will discipline a manager who falsifies a product safety test, but it will not punish an employee who reports the manager to his superiors.

Ewing reports that the trend in business today is toward the "good" model. Statutes, court decisions, collective bargaining agreements, arbitrators' decisions, and the voluntary practices of a number of corporations and public agencies all are moving in this direction.[6] Many employers, however, both public and private, remain closer to the autocratic end of the continuum than to the "good" end. Ewing urges greater progress toward the "good" and away from the autocratic.

Ewing's book contains, in addition to management models, a number of case studies; reported court decisions accompany some of these studies. Although these case studies support Ewing's conclusion that the "good" management model is superior to the autocratic model, the book leaves a number of important questions unexplored. As a result, Ewing's advocacy, although persuasive, is not compelling. Ewing fails to answer questions such as how a "good" organization protects confidential business information; whether "good" organizations generally allow employees to participate in decisionmaking only on certain types of issues; whether

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6. *See* Andrews, *When You Whistle Where You Work*, 11 STUDENT LAW, Mar. 1983, at 11.

employees tend to escalate their demands for participation and thus maintain constant pressure on the organization to expand the list of issues on which it allows employee participation; whether the "good" management model is more suitable for some types of businesses than it is for others; whether the need to consult with employees stifles vigorous decisionmaking; and whether employees who enjoy de facto job tenure in a "good" organization develop the type of complacency that sometimes characterizes the tenured personnel of other institutions. Furthermore, Ewing fails in his book to explore whether "good" organizations, by remaining receptive to employee complaints and suggestions, achieve a degree of honesty, fairness, and legality in their dealings with customers and other outside parties that is demonstrably superior to the level which autocratic enterprises achieve. Ewing strongly implies that employee input cleanses "good" enterprises and that the enterprises as a result deal fairly with customers and others, but he offers no statistical support for this view. A comparison of the track records of "good" enterprises with autocratic enterprises on matters such as products liability claims, prosecutions for illegal activities, or accusations of unfair business practices could test Ewing's hypothesis. Ewing's model of "good" management would be attractive as a matter of plain good business if he could demonstrate that "good" organizations save money because their employees protect the organizations against costly mistakes or improprieties.[7]

Ewing presents general guidelines for the employed professional such as the engineer, accountant, physician, nurse, or lawyer, but he does not explore the role of the employee-professional who supervises other members of the same profession within a single business enterprise. Ewing points out that the professional employed by a business enterprise must cope with loyalties to his em-

7. Answers to these questions would help predict not only whether a corporation that changes from an autocratic to a "good" system can expect to prosper or even to survive in a competitive environment in which other companies cling to the old ways, but also whether the industries of the United States can expect to prosper or even to survive in the international competitive arena if the general emphasis in American corporate management shifts sharply from the autocratic to the "good" model. Studies of management styles and employee codetermination in various countries could provide essential comparative perspectives. *See* Symposium, *Worker Participation in Management*, 4 COMP. L. Y.B. 3 (1980); Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. LEGIS. 947 (1977). A pending project of the American Law Institute on the governance of corporations recently has stimulated interest in reexamining the duties and liabilities of the directors of corporations in the United States and may lead to exploration of the appropriate role of employee participation in corporate governance. *See* Legal Times, Feb. 28, 1983, at 1, col. 2.

ployer that often conflict with his professional code of ethics.[8] The professional code of engineers, for example, requires them to place the public interest above the interests of the client or employer. Ewing urges business enterprises to respect the professionalism of their employees. His "good" organization includes this element of respect.

Although Ewing fails to mention the management problems of law firms, his book provides significant insight into those problems. The two models of business management that Ewing portrays—the autocratic and the "good"—find their parallels in two corresponding models of law firm management. If a law firm adopts an autocratic style of management, the firm expects each associate to obey without question the instructions of a partner. The firm rejects any expression of concern by an associate and the firm may deny promotion or discharge the associate from employment if the associate persists in questioning the partner's instructions. On the other hand, a law firm that adopts the "good" style of management welcomes an expression of concern by an associate and gives that concern serious consideration. The firm respects the associate for having cared enough to raise the matter even if it disagrees with the associate on the merits of the matter.

Ewing's advocacy of the "good" model of business management is incomplete; thus the question whether the "good" management model is desirable or even workable for business enterprises remains open. This Book Review, however, asserts that the "good" model is desirable as a style of law firm management, in part for the same reasons that Ewing advances for his preferred model of business management. In addition, this reviewer's fiduciary theory of the duties of law firm partners and associates provides support for the conclusion that law firms should adopt the "good" model of management. Following a discussion of the limited but significant treatment that the Model Rules give to the issue of law firm management, this Book Review explores in detail the fiduciary theory.

II. THE MODEL RULES

The Model Rules[9] expressly recognize some aspects of the re-

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8. D. EWING, *supra* note 1, at 13, 125-28, 340-41.

9. *See supra* note 2. The ABA Code of Professional Responsibility applies to all lawyers without differentiation between supervising and subordinate lawyers. In practice, a subordinate lawyer who violates the Code under orders from a supervising lawyer may be able to persuade the disciplinary authorities that mitigating circumstances existed. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter ABA CODE]. *See* MODEL RULES OF

lationship between the law firm and its associates. This part of the Book Review discusses only the Model Rules that address specifically law firm management. The Model Rules also establish many substantive rules to govern the practice of law. Part IV of this Book Review applies the pertinent substantive rules to the hypothetical problem but discusses them only to illustrate the relationships between the law firm, the partner, and the associate that arise when these rules are violated.

Model Rule 5.1(a) requires each partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct."[10] Subsection (b) of Model Rule 5.1 requires a supervising lawyer to make "reasonable efforts" to ensure that lawyers under his supervisory authority conform to the rules.[11] The bar may discipline the supervisory lawyer if he orders or ratifies a violation of the rules by a subordinate. Model Rule 8.4(a) reiterates the message of Model Rule 5.1(b) when it states that a lawyer must not "violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another."[12]

Model Rule 5.2 imposes on subordinate lawyers obligations that relate to the duties which Model Rule 5.1 imposes on partners and supervisory lawyers. The subordinate who is accused of violating the rules can successfully defend by showing that he acted "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[13] The Model Rule 5.2 defense, however, is very limited. The associate using the defense must demonstrate that the resolution of the question by the supervisor was "reasonable"; he also must show that the question of professional duty was "arguable."

Model Rule 5.2 has three important implications. First, an associate must refuse to comply with orders that direct the associate to act in clear violation of the rules of professional conduct. In addition, Model Rule 8.3(a) may require an associate faced with improper orders to report his supervising lawyer to the disciplinary

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PROFESSIONAL CONDUCT Rule 5.2 comment (Proposed Final Draft May 1981).

10. *See supra* note 2.

11. *Id.*

12. *Id.*

13. *Id.* This provision is troublesome because it introduces the defense of superior order, which defendants have asserted in some very different and sometimes tragic contexts in recent years—ranging from the Nuremberg trials to the Watergate break-in.

authorities, provided the disclosure does not include any information that the lawyer-client privilege protects.[14] Second, a law firm under Model Rule 5.2 may not discharge or "perfidiously punish"[15] an associate who refuses to comply with an order that clearly violates the rules. Last, Model Rule 5.2 implies that a supervising lawyer must give to an associate upon request an explanation of any order that the supervisor issues. The associate then can determine whether or not the order results from the supervisor's "reasonable determination of an arguable question."[16] Although the Model Rules contain some commendable guidelines for law firm management, they fail to provide comprehensive guidance for law firms or associates. This Book Review suggests a broader formulation of the duties of law firm partners and associates.

III. Proposed Fiduciary Theory

This reviewer suggests that all lawyers owe to all other lawyers a fiduciary duty that arises from the fiduciary obligation of the legal profession to society, and law firms should incorporate this fiduciary duty into their management policies and practices.[17] This Book Review offers a preliminary formulation of principles for the application of this fiduciary duty to the management of the law firm. The principles would require relatively minor adaptation before they could apply also to lawyers who work for governmental agencies, business enterprises, or other employers that are not law firms. These principles go beyond the American Bar Association Code of Professional Responsibility (ABA Code) and the proposed Model Rules. The principles, however, do not purport to address the entire field of professional responsibility; instead they focus only on law office management. Part IV of this Book Review illustrates these fiduciary principles of law office management by applying them to a hypothetical problem.

A. Principle Number One: Development of Other Lawyers

A lawyer should contribute to the professional development of other lawyers. This duty requires senior lawyers in a law firm to train, support, and develop junior lawyers and to maintain a cli-

14. *See supra* note 2.
15. *See supra* note 5.
16. Model Rules of Professional Conduct, *supra* note 2, Rule 5.2.
17. *See* Leubsdorf, *Three Models of Professional Reform*, 67 Cornell L. Rev. 1021 (1982).

mate in which junior lawyers can function and grow professionally. This duty may include granting a request by an associate to transfer from an assignment that conflicts with his values. Junior lawyers have a corresponding duty to the firm and its senior lawyers to express concern if a senior lawyer takes a position that a junior lawyer regards as improper.[18] This principle approaches Ewing's "good" management model; in addition it requires all lawyers to bear a fair share of responsibility for the development of the legal profession—inside as well as outside the law firm.

B. Principle Number Two: Deference to Client

A law firm should give substantial deference to the values and choices of a client. A responsible member of the law firm should explain and discuss with the client any potentially significant value conflicts between the law firm and the client. If the parties cannot resolve these conflicts, the law firm should withdraw from representing the client.[19]

C. Principle Number Three: Deference to Law Firm

A partner or associate in a law firm should give substantial deference to the values and choices of the law firm and of the firm member who is directly serving the client. If the law firm cannot resolve the value conflicts, the firm, to the extent feasible, should grant the request of any lawyer in the firm for transfer to another assignment. The firm should not require a lawyer to participate in a case about which he has a value conflict with the law firm.

D. Principle Number Four: Acts of Conscience

A lawyer should be ready to serve society through an act of conscience even if the act violates the law, the rules that govern the profession, or the lawyer's duty to other lawyers, provided the lawyer believes that this act of conscience is the only feasible way to fulfill a duty to society that transcends his other obligations. A

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18. *See* Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975).

19. For recent explorations of the relationship between the law and the moral perceptions of the lawyer, see T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); O'Connor, *Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision*, 36 VAND. L. REV. 1 (1983). This reviewer does not subscribe to Professor Patterson's view that law schools should teach only rules of law. *See* L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY V (1982).

lawyer should be tolerant of another lawyer's acts of conscience. Before taking adverse action against a lawyer who committed a violation by an act of conscience, a law firm or bar disciplinary agency should consider the circumstances and the options that were available to the lawyer at the time of the violation and take into account the conscientious nature of the violation as a defense or mitigating circumstance to reduce the severity of the sanction.[20]

IV. Hypothetical Law Firm

The following hypothetical example provides a factual background for a discussion of the application to a law firm of Ewing's book, the Model Rules, and the fiduciary theory that this reviewer proposes. Assume that John and Jane are associates in a law firm. A partner (Partner) assigns them to assist him in representing a corporate client (Client). Assume also that Client is resisting enforcement of an order by a federal agency to correct certain safety hazards in its workplace and that it has instructed the law firm to use every available administrative and judicial proceeding to prevent or delay enforcement of the order. The law firm has entered into an hourly fee arrangement with Client.

A. Hypothetical Problems

John and Jane encounter the following problem areas with Partner and Client:

1. Padding Time Reports: Partner instructs John and Jane to pad by about twenty percent their time reports for Client. This padding will provide documentation for the law firm to bill Client for substantially more time than the law firm spent on the matter.

2. Frivolous Position: John and Jane become convinced by documents in Client's files and by legal research that Client is in clear violation of the worker safety laws, that the agency's order is completely proper, and that any resistance by Client is totally frivolous.

3. Moral Disapproval: John has strong personal feelings about the responsibility of employers to provide safe working conditions.

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20. Violations of the ABA Code, *supra* note 9, justified on constitutional grounds, have become an accepted and apparently respectable means of testing the validity of ABA Code provisions. *See, e.g.*, In re R___ M. J___, 102 S. Ct. 929 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Violations of the law or the ABA Code on grounds of conscience do not have the same authoritative support. For examples of disobedience on grounds of conscience, see Levinson, *Civil Disobedience and the Need for a Proportioned Response*, 20 U. Fla. L. Rev. 278 (1968); *infra* text accompanying notes 31-42.

Even if Client could justify its position under any interpretation of the law, John would suffer moral outrage if Client were to continue to maintain unsafe working conditions for its employees.

4. Conflict of Interests: John's fiancee, Betty, is a lawyer on the staff of the federal agency that ordered Client to correct the worker hazards. The agency has not assigned Betty to handle any aspect of the Client matter. John mentions this possible conflict to Partner, who says that no conflict of interests exists because John and Betty are not married, and that even if they were married, no problem would arise unless Betty handled directly the Client matter.

5. False Reports on Product Safety: A senior engineer employed by Client approaches Jane and tells her, "strictly off the record," that Client is producing and marketing a product which has a safety defect. As a result of this defect, a user of the product could suffer serious or even fatal injury. To cover up this hazard, former engineers repeatedly sent false reports of product safety tests to trade organizations and regulatory authorities. Top management knows of the defect and of the false reports. The engineer will give Jane a signed statement about the defect only if Jane first gives him a signed statement from Client's top management that guarantees no reprisals. The engineer says that without the statement from Client he will "forget" that he has ever spoken to Jane.

B. Application of Ewing to the Hypothetical

Since Ewing does not treat specifically the relationship between the law firm and its associates, his book does not help directly to resolve the hypothetical problems of John and Jane. Ewing's book implies that the law firm, like any other employer, should engage in "good" management practices with its associates. Ewing, however, does not explore how the law firm would implement "good" management. The hypothetical problem of the engineer who is an employee of Client and who wishes to reveal the false product safety test reports that Client has issued does fit within Ewing's discussion. Ewing asserts that top management of a business enterprise should be receptive to employee complaints of wrongdoing, and he concludes that if top management refuses to listen, employees may have a duty to report publicly the problem, especially if the employees are professionals like engineers.[21] Ewing asserts that the law should protect employees from management

21. D. EWING, *supra* note 1, at 13, 125-28, 340-41.

reprisals as indeed it does already in some states.[22] Ewing, however, does not explore the possibility illustrated in our hypothetical that an employee with a complaint may seek the help of the law firm that represents the enterprise.

C. *Application of the Model Rules and the Fiduciary Theory to the Hypothetical*

The Model Rules and Ewing's general endorsement of "good" management provide a firm basis for the development of the fiduciary theory of legal professionalism. The hypothetical example of John and Jane illustrates the apparent impact of the Model Rules alone and the effect of the combined application of the Model Rules and the fiduciary theory of duty.

1. Padding Time Reports[23]

Partner's request that John and Jane pad time reports is a clear violation of the Model Rules. Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."[24] Furthermore, padding time reports is inconsistent with the obligation of a lawyer to his client to be competent,[25] diligent,[26] reasonable with regard to fees,[27] and independent in the exercise of professional judgment based on candid advice.[28] John and Jane therefore must refuse to pad time reports. Furthermore, Partner has violated the Model Rules by giving the instruction. Model Rule 5.1(b) requires the supervising lawyer to make reasonable efforts to ensure that lawyers under his authority conform to the Rules, and Model Rule 8.4(a) prohibits a lawyer from knowingly inducing another person to violate the Rules. John and Jane have a duty to report Partner's violation to the bar discipline authorities because

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22. *See* Andrews, *supra* note 6.

23. This footnote, as well as footnotes 30, 31, 34, and 36, cites the major provisions of the ABA CODE, *supra* note 9, that pertain to the subject matter of the accompanying text. With regard to padding a time report, DR 1-102(A)(4) is the same as Model Rule 8.4(c) in that both provisions prohibit conduct that is dishonest, fraudulent, deceitful, or misrepresentative. DR 6-101 requires competence, DR 7-101(A) requires zealous representation, DR 2-106 prohibits illegal or clearly excessive fees, DR 5-101(A) requires the lawyer to exercise independent professional judgment on behalf of the client, and DR 1-103(A) requires that a lawyer possessing unprivileged knowledge of a violation of the Code report it to the disciplinary authorities.

24. *See supra* note 2.

25. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.1.

26. *Id.* Rule 1.3.

27. *Id.* Rule 1.5.

28. *Id.* Rule 2.1.

the violation raises a substantial question about Partner's honesty, trustworthiness, or fitness as a lawyer. Model Rule 8.3(c), which incorporates the confidentiality provisions of Model Rule 1.6, apparently does not prevent disclosure of Partner's violation because the disclosure does not reveal any lawyer-client confidences.

Partner's violation under the Model Rules is complete as soon as he gives the instruction to pad the time reports, even if the associates do not comply with that instruction, and even if they can convince Partner to withdraw his order. An associate who persuaded a partner to withdraw the instruction probably would not report the matter to bar authorities, and even if the associate made a report, the bar authorities likely would not impose discipline. Nevertheless, the Model Rules do not expressly provide an excuse if the supervising lawyer withdraws the improper instruction before the subordinate complies.

Fiduciary Principle Number One, Development of Other Lawyers, in contrast with the Model Rules, would require John and Jane to try to dissuade Partner from his misguided position. If Partner persists, the same principle would require John and Jane to seek further consultation within the law firm and through any available advisory committee of the bar.[29] The fiduciary theory, as applied to this part of the hypothetical problem, thus emphasizes the duty of a junior lawyer to make every attempt to correct an apparent error in a senior lawyer's perception of professional duty.

2. Frivolous Position[30]

Partner has violated Model Rule 3.1 by instructing John and Jane to take a frivolous position on behalf of Client. Under the Model Rules John and Jane should not comply with this instruction.[31] John and Jane, however, may find it impossible to report Partner's violation to bar authorities because their report probably

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29. See Note, *supra* note 18, for a discussion of a proposed advisory committee system.

30. ABA CODE, *supra* note 9, DR 7-102(A)(1), (2). This rule prohibits frivolous litigation.

31. ABA CODE, *supra* note 9, EC 2-26. This ethical consideration declares that a lawyer should not lightly decline proffered employment because the ABA Code stresses the obligation of the legal profession to make legal services fully available. The Model Rules do not assert this obligation. EC 7-8 suggests that the lawyer advise his client of the moral as well as the legal aspects of a matter but emphasizes that the client must make the final decisions. DR 2-110(C)(1)(e) permits a lawyer to withdraw from a case not pending before a tribunal if the client insists that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer, even though no particular disciplinary rule prohibits it.

would require disclosure of Client confidences to support their allegation that the position Partner wished to take was frivolous.

Fiduciary Principle Number One would require John and Jane to try to dissuade Partner and, if necessary, to seek further consultation within the law firm and through any available bar advisory committee. John and Jane also may explore the question whether Fiduciary Principle Number Four, Acts of Conscience, would oblige them to report Partner to bar authorities, even though the filing of a report might violate the Model Rules provision on disclosure of Client confidences. John and Jane could invoke fiduciary Principle Number Four only if they believed that the filing of a report fulfilled a transcendent duty to society. Since Partner's intention to file one frivolous lawsuit is not likely to pose a danger to society sufficient to justify a violation of the Model Rules, Fiduciary Principle Number Four does not require John and Jane to perform an act of conscience in violation of the Model Rules.

3. Moral Disapproval

Model Rule 1.2(b)[32] states that a lawyer's representation of a client is not an endorsement of the client's political, economic, social, or moral views or activities. Model Rule 1.16(b)(5), however, permits a lawyer to withdraw from representing a client if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[33] Model Rule 1.16(b)(5), by referring to a client who "insists" upon pursuing the repugnant or imprudent objective, implies that the lawyer first should discuss any problem with the client in accordance with Model Rule 2.1, which permits a lawyer to advise his client on "other considerations such as moral, economic, social and political factors" in addition to legal matters.[34] The client, after hearing the advice of his lawyer, may "insist" on pursuing an objective that the lawyer regards as repugnant or imprudent, in which event under Model Rule 1.16(b)(5) the lawyer may withdraw.

The Model Rules clearly permit a law firm to withdraw if a client insists on pursuing an objective that the law firm regards as

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32. *See supra* note 2.

33. *Id.*

34. ABA CODE, *supra* note 9, DR 5-101. This rule prohibits a lawyer from accepting employment, except with the consent of the client after full disclosure, if the lawyer's own financial, business, property, or personal interests will or reasonably may affect the exercise of his professional judgment on behalf of the client. EC 9-6 urges lawyers to avoid not only professional impropriety but also the appearance of impropriety.

repugnant or imprudent; thus John and Jane are well within their rights in raising with Partner the question of withdrawal. Partner, however, may decide for the law firm that Client's objective is not repugnant or imprudent. The firm, as a courtesy, may permit John and Jane to seek reassignment from a matter that is unpalatable to them personally, but the Model Rules do not impose an obligation upon the law firm to extend this courtesy.

Fiduciary Principle Number Three,[35] Deference to Law Firm, instructs that John has no right to impose his moral values on Partner, the law firm, or Client, and Fiduciary Principle Number Two, Deference to Client, cautions that the law firm also has no right to impose its values on Client. Under both the fiduciary theory and the Model Rules, John does have a right to express his moral concerns to Partner and others in the law firm to allow the law firm to examine its stance on the value issue. If the law firm shares John's moral disapproval of Client's position and the firm fails to persuade Client to alter this position, the firm should withdraw. If, on the other hand, the law firm does not share John's moral position, the law firm properly may proceed with the representation. The firm, however, under Fiduciary Principles Number One, Development of Other Lawyers, and Number Three, Deference to Law Firm, has an obligation to relieve John of the assignment and reassign the matter to qualified personnel who do not morally disapprove of Client's position. The firm must withdraw if no lawyer in the firm with the requisite technical ability is willing to work on the assignment.

The law firm may suffer inconvenience or financial loss if the firm accepts the work from Client and then has to assign the matter to another associate because of John's moral disapproval and subsequent inability to accept the assignment. If John frequently rejects assignments on the ground of moral disapproval, this pattern may indicate that John is incompatible with the firm. He may need to seek employment elsewhere, not as a reprisal for his moral concerns, but because he should not insist that the law firm subsidize those concerns.

The fiduciary theory thus provides a framework for accommodating the varying value positions of the client, the law firm, and the individual lawyer within the law firm. The theory also provides increased protection for the associate whose values may differ from the values of the client or of the firm.

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35. *See supra* part III(C).

4. Conflict of Interests[36]

Model Rule 1.7(b) prohibits a lawyer from representing a client if that representation may be "materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."[37] The only possible basis under Model Rule 1.7(b) for John's concern about his fiancee working for the enforcing agency is that his own interests would limit his ability to represent Client. The law firm, as a courtesy, may relieve John of the assignment, but the Model Rules do not appear to entitle him to this relief.

Fiduciary Principles Number Three, Deference to Law Firm, and Number One, Development of Other Lawyers, require the law firm to relieve John from the assignment if John feels professional discomfort in representing Client. Although the law firm may regard John's attitude as overly sensitive, the firm should defer to any reasonable request of an associate for reassignment. If John's primary expertise, however, is in the area that the agency regulates and he continues to ask for reassignment, he may be incompatible with the firm.

5. False Reports on Product Safety[38]

Model Rule 1.6(b)(1) permits but does not require a lawyer to disclose a client's confidential information to the extent the lawyer reasonably believes necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[39] In our hypothetical,

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36. ABA CODE, *supra* note 9, DR 4-101(C)(3). This rule permits a lawyer to reveal the client's intention to commit a crime. EC 5-18 states that a lawyer employed by a corporation represents the entity and not any individual within the entity. EC 5-20 allows a lawyer to serve as an impartial arbitrator or mediator, and EC 5-19 permits a lawyer to serve multiple clients whose interests are not actually or potentially differing.

37. *See supra* note 2. In similar situations, Model Rule 1.13(b) requires that if a lawyer knows that an officer or employee of the client is conducting illegal and dangerous activities "in a matter related to the representation," the lawyer "shall proceed as is reasonably necessary in the best interest of the organization." In the hypothetical example, the false reports on product safety do not appear to be a matter "related to the representation"; hence this rule does not apply.

38. The law firm's silence arguably could render it liable in tort to victims of the dangerous product, but that possibility is beyond the scope of this discussion.

39. One commentator has indicated that many employees have paid serious personal prices for whistle blowing, but that an increasing amount of legal protection recently has become available to them. *See* Andrews, *supra* note 6. Andrews bases this conclusion on D.

if the sale of Client's products after the filing of false safety reports is a criminal act, and if the law firm determines that the sale of the product in these circumstances is likely to result in imminent death or substantial bodily harm, the law firm either may make disclosure or may remain silent.[40]

Under the Model Rules Jane should report to Partner her conversation with the engineer. The law firm then will have an opportunity to decide whether under Model Rule 1.6(b)(1) it may disclose the information and, if so, whether it should disclose the information. Model Rule 1.6(b)(1) gives the law firm considerable latitude; Jane has no basis to complain to bar authorities about the law firm's conduct unless the firm discloses Client confidences when Client is not about to commit a criminal act, or when Client is about to commit an act that is criminal but clearly will not result in imminent death or substantial bodily injury.

The request by the engineer-employee that Jane protect him against reprisals from Client triggers Model Rule 2.2, which discusses the role of a lawyer who acts as an intermediary between clients. According to Model Rule 2.2, Jane must continue to regard Client Corporation, not the engineer, as the law firm's client unless the law firm also agrees to represent the engineer separately. The law firm can accept the engineer as a client and act as an intermediary between the engineer and Client Corporation only if Client Corporation gives prior approval. The law firm must give Client Corporation reasonable information about the proposed intermediary role of the law firm before Client Corporation validly can consent to the arrangement. Partner and the law firm have wide discretion in this area. Under the Model Rules Jane has no basis for complaining to bar authorities unless the law firm treats the engineer as a client before clearing the representation with Client Corporation.

Fiduciary Principle Number One instructs Jane first to consult with Partner, other members of the law firm, and any available advisory committee of the bar. If these consultations do not resolve the matter, Jane should consider Fiduciary Principle Number Four, Acts of Conscience. In considering an act of conscience, Jane must balance the consequences of her act for society against the consequences for the engineer, Client, the law firm, and herself. Jane's duty to society to protect potential victims from an alleg-

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EWING, *supra* note 1, as well as on other sources.

40. *See* Andrews, *supra* note 6.

edly dangerous product may require her to report Client's safety hazard to appropriate authorities or to the press. Before reporting the safety hazard Jane should examine the factual basis of the engineer's warning as carefully as possible and seek independent advice from other trusted persons. These attempts to obtain external advice probably will violate the Model Rules regarding disclosure of Client confidences, but this situation may justify conscientious violation of these rules so that Jane can solicit advice. Jane should make every feasible effort to seek advisors whose discretion and capacity to retain confidences are beyond reproach.

If after careful analysis of the facts and consultation with others Jane decides on the basis of her transcendent duty to society to report the safety hazard to the authorities or to the press, she faces two possible responses. Her act of conscience may persuade the law firm, the engineer, Client, and the bar authorities that she took the proper action. Her willingness to make a personal sacrifice then may reform the attitudes and practices of others. On the other hand, Jane's act of conscience may result in her discharge from the law firm and in disciplinary action by bar authorities.[41] She may emerge as an attractive candidate for employment by a law firm or other organization that has a commitment not only to Ewing's notions of "good" management, but also to the proposition that a person who places her career on the line to protect the public against serious danger may be an employee worth having.

The fiduciary theory does not and cannot give detailed guidance for the specific situations in which a lawyer should commit an act of conscience. The theory, however, recognizes that each lawyer ultimately must make an individual value judgment by weighing his general obligations to obey the law, to conform to professional rules, and to support other lawyers against a transcendent duty to society. Some lawyers never may face this dilemma and others may face it rarely. No theory of the professional duty of lawyers, how-

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41. Even if the state has enacted a statute to protect whistle-blowers against retaliatory discharge from employment, *see supra* note 39, the impact of that statute on Jane may be uncertain. The courts may hold the statute inapplicable to associates who are employed by law firms, on the ground that any attempt to apply the statute to associates would encroach upon the power of the state's highest court to regulate the practice of law.

In addition to facing discharge and bar discipline, Jane may be subject to civil liability to Client Corporation for disclosure of confidential information. If Jane is liable, the law firm also may be liable under the principle of *respondeat superior*. The possibility of civil liability for improper disclosure and the analogous possibility of civil liability for nondisclosure, *see supra* note 38, are beyond the scope of this discussion.

ever, should ignore the possibility that this moral dilemma will arise, and no theory should impose upon the lawyer an absolute obligation to suppress his feelings of duty toward society when these sentiments collide with his other obligations as a lawyer.

V. CONCLUSION

Although Ewing's book fails to treat specifically the relationship between the law firm and its associates, his general orientation to "good" management is consistent with the theory of fiduciary duty that this Book Review proposes. Ewing's advocacy of "good" management in business enterprises is in effect an assertion that the managers of business enterprises are professionals with a fiduciary duty to each other as well as to the employees, customers, and suppliers of the enterprise. Ewing's model of "good" business management could provide examples worthy of the serious attention of many professions.

The Model Rules also reinforce "good" management policies. The Model Rules, however, neglect to provide the necessary framework for accommodation of the varying value positions of the client, the law firm, and the individual lawyers in the firm. The fiduciary theory that this reviewer proposes incorporates the Model Rule requirements pertaining to law firm management and provides additional guidance for accommodating the varying value positions that lawyers face.

The question arises whether the differences between the legal profession and general business enterprises make Ewing's "good" management model more or less appropriate for law firm management than for general business management. This Book Review asserts that the legal profession is an even more appropriate setting than the business enterprise for adoption of the "good" management model. The fiduciary relationship among lawyers and the bar's unique fiduciary duty to society emphasize the special need of the legal profession for the "good" management model.

Some professionals argue that the bar best serves society when law firms do whatever the client wants and when associates of law firms do whatever the supervising partner wants. Obedience to the client or to the supervising partner in a law firm is often a useful virtue; society should be able to assume that lawyers generally will follow the norm of obedience. The legal profession, however, owes a duty to society that is higher than the guarantee of permanent obedience.

Ewing reports that some stalwart employees of business enter-

prises followed their consciences even though their employers were autocratic. Many of these employees paid heavy personal prices for taking these positions. These sacrifices, however, contributed to the current acceptance of the "good" management model for business enterprises. The legal profession has important lessons to learn from the employees who paid a price for their acts of conscience, as well as from the small but growing number of employers who have adopted the "good" management policies and practices that Ewing advocates in his book.